U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-I-R-

DATE: AUG. 7, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an ophthalmologic researcher, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits additional evidence and contends that he is eligible for a national interest waiver under the *Dhanasar* framework.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> > (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> > (B) Waiver of job offer –
> >
> > > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[2]

II. ANALYSIS

The Director found that the Petitoner qualifies as a member of the professions holding an advanced degree.[3] The sole issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

The record reflects that the Petitioner worked as a pediatric ophthalmic surgeon at from September 2009 until November 2015. In addition, he indicates that he was employed as an ophthalmic consultant and scientist at from February 2012 until December 2015, and as an ophthalmologist and consultant at the at from June 2013 until December 2015. On December 24, 2015, the Petitioner was admitted to the United States as an F-1 nonimmigrant student.

A. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner indicates that he intends to continue his research aimed at developing new and improved treatment options for retinopathy of prematurity (ROP), a degenerative eye disease that causes blindness in children. He states: "Currently, I am developing digital applications aimed to advance data analysis research and improve diagnostic techniques to make ROP diagnosis more widely available throughout the world." In addition, the Petitioner asserts that he will pursue "research on cicatricial ROP and OCT [Optical Coherence Tomography] technologies to develop more efficient treatment options in the U.S. and internationally." He also explains that he will strive "to make new developments in my industry, including new software for layer segmentation that I am independently working on, and I hope to patent in the United States."

The record includes information about age-related eye diseases in the United States from the For example, according to the , ROP "is a potentially blinding eye disorder that primarily affects premature infants weighing about 2¾ pounds

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[3] The Petitioner presented an academic credentials evaluation indicating that his degree from (2014) is the foreign "equivalent of the U.S. degree of Doctor of Philosophy in Biomedical Sciences earned at a regionally accredited institution of higher education in the United States." *See* 8 C.F.R. § 204.5(k)(3)(i)(A).

(1250 grams) or less that are born before 31 weeks of gestation . . . . About 14,000 – 16,000 of [U.S.] infants are affected by some degree of ROP." We find that the Petitioner's proposed research aimed at improving diagnosis and treatment options for ROP has substantial merit.

To satisfy the national importance requirement, the Petitioner must demonstrate the "potential prospective impact" of his work. In addition to information from the [redacted] the record includes letters of support discussing the potential benefits of his proposed eye disease research. For instance, [redacted] emeritus professor of ophthalmology at [redacted] contends that the proposed research stands to "substantially benefit our work here in the United States, especially in the fight to decrease ROP blindness and in the development of new diagnostic methods for retinal diseases." Furthermore, the Petitioner has submitted documentation indicating that the benefit of his proposed research has broader implications for the field, as the results are disseminated to others in the field through medical journals and conferences. As the Petitioner has documented both the substantial merit and national importance of his proposed research, we find that he meets the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner. The record includes documentation of his academic credentials, medical training, research articles, conference presentations, and citation reports. He also submitted evidence of his professional memberships, two young scientist award nominations, three [redacted] patent certificates, an "implementation certificate" from [redacted] and reference letters discussing his research experience and projects.[4]

With respect to his research contributions, the Petitioner asserts that "he has invented one of the only techniques to detect ROP" and that his techniques have been awarded patents, implemented in healthcare systems, presented at international conferences, and cited by other researchers. He also contends that "his techniques are being used by other experts in the field to advance a cure for ROP."

In letters supporting the petition, several references discussed the Petitioner's research that investigated the cicatricial phase of ROP. While complementary of the Petitioner's work, they do not offer sufficient detail regarding his claims that his techniques have been "implemented in healthcare systems" and utilized by others in the field "to advance a cure for ROP." For example, [redacted] General Secretary of the [redacted] indicates that the Petitioner's "focus on the later stage of ROP is important because it could create better treatment options and cures for this disease even at the most advanced stages, leading to its potential eradication." In addition, [redacted] asserts that the Petitioner's "research into ROP focused on the cicatricial (scarring) phase of the disease, which has benefited the medical community's knowledge." While [redacted] states he was impressed by the "research that [the Petitioner] has performed in the field of [ROP], as well as his development of novel instrumental methods for

[4] We discuss only a sampling of these letters, but have reviewed and considered each one.

diagnosing ROP and other retinal diseases," he does not offer specific examples of how the Petitioner's methods have been implemented or utilized in order to support the Petitioner's claims. Although the Petitioner provides an "implementation certificate" stating that his "prognostication methods of clinic-functional outcomes of a cicatricial retinopathy of immature infants of 3-4 degrees" were implemented in pediatric consulting and outpatient department, the record does not show that those methods have been utilized beyond this institute or that the extent of their usage is otherwise sufficient to demonstrate a record of success in his research.

Furthermore, the record includes a letter from general director of named after a Russian medical device manufacturer, indicating that the Petitioner worked on the project entitled describes this work as "a promising technology that allows to significantly improve the OCT method and visualize eye tissues practically at the cellular level." He further asserts that the Petitioner has "made a significant contribution" to the project's "optical coherence tomography and adaptive optics," but the record does not adequately document implementation of this work at medical centers or ophthalmological clinics, or show how it otherwise renders him well positioned to advance his proposed endeavor.

With respect to his published research, the Petitioner's appellate submission includes a citation report from showing that one of his articles has been cited to seven times and that six of his other articles have each been cited to once. The record also includes a citation report from reflecting similar results. The Petitioner does not, however, offer comparative statistics indicating how often other ophthalmologic researchers are cited, nor does the record otherwise demonstrate that his published and presented research constitutes a record of success or a level of interest in his work from relevant parties sufficient to meet this prong.

The record demonstrates that the Petitioner has conducted, published, and presented research during his medical career and worked on diagnostic methods for eye diseases. While we recognize that research must add information to the pool of knowledge in some way in order to be accepted for publication, presentation, funding, or academic credit, not every individual who has performed original research or coauthored patents will be found to be well positioned to advance his or her proposed research. Rather, we examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed research, record of success in similar efforts, or generation of interest among relevant parties supports such a finding. *Id.* at 890. The Petitioner has not shown that his research has been frequently cited by independent researchers or otherwise served as an impetus for progress in the field, that it has affected diagnostic methods outside of the medical institutions where he has worked, or that it has generated substantial positive discourse in the broader ophthalmology community. Nor does the evidence otherwise demonstrate that his work constitutes a record of success or progress in his area of research.

[5] This letter states that the Petitioner worked for the company from December 2012 until October 2014.

Regarding the Petitioner's professional memberships, he provided evidence that he is member of the [redacted] The Petitioner has not provided the specific membership requirements for these associations, or offered other evidence demonstrating that his involvement rises to the level of rendering him well positioned to advance his proposed research endeavor. Furthermore, with respect to his young scientist award nominations, the record does not show that such nominations for those in the early stages of their careers represent a record of success in his field or that they are otherwise an indication that he is well positioned to advance his proposed ophthalmology research.

With regard to the Petitioner's plan for future activities in the United States, he states: "I intend to make new developments in my industry, including a new software for layer segmentation that I am independently working on, and I hope to patent in the United States. Further, I am also currently applying for researcher positions throughout the United States."[6] The Petitioner provides a letter from [redacted] a pediatric ophthalmologist at the [redacted] in [redacted][7] Louisiana, stating that the Petitioner asked him for assistance "in his search for a suitable research position in the USA in the medical field." The record, however, does not include evidence of the research positions to which the Petitioner has applied to illustrate the capacity in which he intends to work. Nor is there supporting documentation showing whether the Petitioner has engaged in research activities since his arrival in the United States in December 2015 or whether any relevant parties are interested in funding or otherwise supporting his future research activities in this country. Furthermore, aside from [redacted] and [redacted] letters, the record does not include any other letters from ophthalmologists, potential customers, users, or investors in the United States expressing their interest in the Petitioner's proposed endeavor to develop layer segmentation software and digital applications for ROP diagnosis.

In the appeal brief, the Petitioner refers to an AAO non-precedent decision concerning a physician whose proposed endeavor involved developing surgical and non-surgical spinal treatments. *See Matter of I-K-C-*, ID# 613815 (AAO Oct. 24, 2017).[8] In addition, the Petitioner references another AAO non-precedent decision from January 2009 for an engineer that was adjudicated under the vacated *NYSDOT* framework. He contends that the Director "erred by judging the number of [the Petitioner's] citations rather than the success and impact of the research." The aforementioned decisions were not published as a precedent and therefore they do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

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[6] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for him to have a job offer from a specific employer. However, we will consider evidence relating to his future plans to determine whether he is well positioned to advance his proposed endeavor as required under the second prong of the *Dhanasar* framework.

[redacted]

[8] In the cited matter, the evidence was not sufficient to meet the second prong of the *Dhanasar* framework.

Here, the Petitioner has not shown that the evidence and issues in the above non-precedent decisions are substantially similar to the present case. Furthermore, the evidence offered in the present matter is insufficient to show that the Petitioner's ophthalmology research constitutes a record of success or progress in his field, or has garnered degree of interest in his work from relevant parties, that would rise to the level of rendering him well positioned to advance his proposed endeavor aimed at improving diagnosis and treatment options for ROP. As the record is insufficient to demonstrate that the Petitioner is well positioned to advance his proposed endeavor, he has not established that he satisfies the second prong of the *Dhanasar* framework.

C. Balancing Factors to Determine Waiver's Benefit to the United States

As explained above, the third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. Here, the Petitioner claims that he is eligible for a waiver due to his expertise in ophthalmology, research contributions, and the impracticality of labor certification, and because of the urgency of finding a cure for ROP. However, as the Petitioner has not established that he is well positioned to advance his proposed endeavor as required by the second prong of the *Dhanasar* framework, he is not eligible for a national interest waiver and further discussion of the balancing factors under the third prong would serve no meaningful purpose.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of D-I-R-*, ID# 1441011 (AAO Aug. 7, 2018)